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5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**

7 PETITION TO AMEND RULE 6(e),
8 ARIZONA RULES OF CIVIL
9 PROCEDURE

Supreme Court No. R-09-0030

**Comment of the State Bar of Arizona
Regarding Petition to Amend Rule
6(e), Arizona Rules of Civil
Procedure**

12
13 The State Bar of Arizona supports the petitioner's proposal to amend Rule 6(e) of
14 the Arizona Rules of Civil Procedure. The proposal would incorporate the language used
15 in Rule 6(d) of the Federal Rules of Civil Procedure that prescribes the method for
16 calculating additional time for a response when a motion or other paper is served by mail
17 or by certain other forms of service. Currently, Arizona Rule 6(e) is ambiguous in some
18 situations and can be reasonably interpreted as prescribing a method of calculating a
19 response time that is different than the one set forth under Federal Rule 6(d), which is
20 vexing to anyone trying to calculate when a response or other paper is due. The
21 petitioner's proposed amendment would cure that ambiguity and conform the state rule
22 with the federal rule.

23 As is set forth below, the State Bar also recommends a small change to Rule 6(a) to
24 further clarify the interaction between Rule 6(a) and Rule 6(e). It further recommends
25 adopting a proposed State Bar Committee Note (similar to a Committee Note that now
26 accompanies the federal rule) to illustrate how the Rule is supposed to be applied.

1 Attached as Appendix A is a red-line version of Rules 6(a) and 6(e) of the Arizona Rules
2 of Civil Procedure that shows the State Bar's proposed amendment to Rule 6(a), the
3 petitioner's proposed amendment to Rule 6(e), and the proposed State Bar Committee
4 Note.¹

5
6 **Rationale Supporting Adoption of the Proposed Amendment**
7 **and the State Bar's Additional Proposals**

8 When a motion or other court filing is served, judges and lawyers need to know
9 when the response is due. Unfortunately, because of the interplay between Rules 6(a) and
10 6(e) of the Arizona Rules of Civil Procedure, the answer is not always clear, creating an
11 annoying administrative headache for both judges and practitioners. Moreover, the
12 method of calculating the response time under those rules may be different than the
13 method of calculation now found in Rules 6(a) and 6(d) of the Federal Rules of Civil
14 Procedure, compounding the confusion.

15 The ambiguity in the existing state rule can be illustrated by referring to the Federal
16 Rule 6(d) and the illustrations provided in the Committee Note to the 2005 Amendments
17 to that Rule. The federal Rule provides that when service is effected by mail or certain
18 other types of service, "3 days are added after the period would otherwise expire under
19 Rule 6(a)." The Committee Note to the Rule offers the following illustration of how
20 Federal Rule 6(d) interacts with Federal Rule 6(a): "The effect of invoking the day when
21 the prescribed period would otherwise expire under Rule 6(a) can be illustrated by
22 assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the
23 period expires on the next day that is not a Sunday or legal holiday. If the following
24 Monday is a legal holiday, under Rule 6(a) the period expires on Tuesday. Three days are

25 ¹ The red-line revisions set forth in Appendix A likewise reflect the deletion of
26 references in the title and body of Rule 6(e) to Rule 5(c)(2)(E), a non-existent subsection
of Rule 5(c)(2). By Order of the Arizona Supreme Court in No. R-09-0025, the erroneous
cross-references in Rule 6(e) to Rule 5(e)(2)(E) have been ordered corrected, effective
January 1, 2010.

1 then added -- Wednesday, Thursday, and Friday as the third and final day to act.”

2 It is unclear whether Arizona Rules 6(a) and 6(e) now follow the same method of
3 calculating the response deadline in the situation described in the illustration. Arizona
4 Rule 6(e) says that when a motion or other paper is served by mail or certain other forms
5 of service, “five calendar days shall be added to the prescribed period.” Arizona
6 Rule 6(e), however, does not define what “prescribed period” means. It could refer to the
7 “prescribed period” after Arizona Rule 6(a) is applied (which is what the federal Rule says
8 explicitly), in which case the days would be counted in the same manner as described in
9 the illustration to the federal Rule. That would make a response due one week and two
10 days after the thirtieth day if it is a Saturday; and if the following Monday is a legal
11 holiday, one would start counting the days on Tuesday, the fifth day would be the
12 following Saturday, and, applying Rule 6(a) again, the response would be due on the
13 following Monday.

14 But the current Rule’s reference to “prescribed period” also could refer merely to
15 the period of time prescribed by rule before one applies Rule 6(a). Indeed, Rule 6(a)
16 seems to suggest that this is the case because it refers to “computing any period of time
17 *prescribed* or allowed by these rules.” Ariz. R. Civ. P. 6(a) (emphasis added). Thus,
18 using the illustration above, if the thirtieth day falls on a Saturday, five calendar days
19 would be added, starting on Sunday. That would make the response due on Thursday
20 rather than the following Monday.

21 The current ambiguity in Arizona Rule 6(e) can be eliminated by adopting the
22 petitioner’s proposal and modifying Rule 6(e) to correspond with language similar to that
23 used in Federal Rule 6(e), clarifying that five days are added “after the prescribed period
24 would otherwise expire under Rule 6(a).” The proposed rule change would also make the
25 federal and state rules the same, eliminating the need for practitioners to remember two
26 different rules for counting time.

1 The State Bar has two other suggestions:

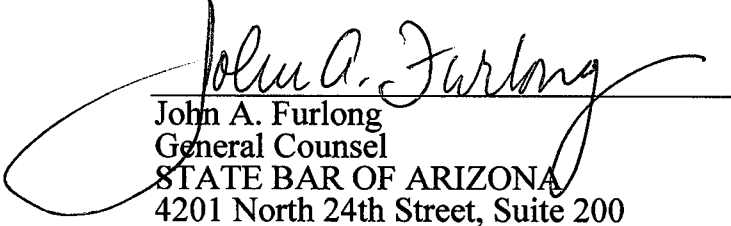
2 First, the word "prescribed" should be deleted from Arizona Rule 6(a) and
3 replaced with the word "specified" (the word used in Federal Rule 6(a)), which would
4 eliminate the confusion now arising from the use of the word "prescribed" in both Rules
5 6(a) and 6(e).

6 Second, given the confusion experienced by both lawyers and non-lawyers (such as
7 administrative assistants and docketing clerks) given responsibility for calculating
8 response and reply times, the State Bar recommends that the Court include a State Bar
9 Committee Note that illustrates how the rule is supposed to be applied. To avoid any
10 question about whether the federal and state rules are to be interpreted differently, the
11 language proposed by the State Bar tracks the illustrations and language used in the
12 Committee Note to the 2005 Amendments to Federal Rule 6(e).

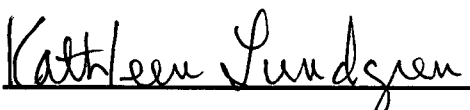
13 **Conclusion**

14 The State Bar of Arizona respectfully requests that the Court adopt the petitioner's
15 proposed rule change. It further requests that the Court amend Rule 6(a) and include the
16 proposed State Bar Committee Note with the Rule as is suggested in this comment and
17 shown in Appendix A.

18 RESPECTFULLY SUBMITTED this 18th day of December, 2009.

19
20 
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24 Electronic copy filed with the
25 Clerk of the Supreme Court of Arizona
this 18th day of December, 2009.

26 by 

APPENDIX “A”

State Bar's Proposed Modification to Petitioner's Proposed Changes

(Petitioner's proposed changes shown in italics (with additions shown by underscoring and deletions shown by ~~"strike-through"~~; State Bar's proposed modifications shown without italics, with additions shown by underscoring and deletions shown by ~~"strike-through"~~)

1 Rule 6. Time

2 Rule 6(a). Computation

3 In computing any period of time ~~prescribed~~ specified or allowed by these rules, by
4 any local rules, by order of court, or by any applicable statute, the day of the act, event or
5 default from which the designated period of time begins to run shall not be included.
6 When the period of time ~~prescribed~~ specified or allowed, exclusive of any additional time
7 allowed under subdivision (e) of this rule, is less than 11 days, intermediate Saturdays,
8 Sundays and legal holidays shall not be included in the computation. When the period of
9 time is 11 days or more, intermediate Saturdays, Sundays and legal holidays shall be
10 included in the computation. The last day of the period so computed shall be included,
11 unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until
12 the end of the next day which is not a Saturday, a Sunday or a legal holiday.

13

14 Rule 6(e). Additional time after service under Rule 5(c)(2)(C), or (D) ~~or (E)~~

15 Whenever a party has the right or is required to do some act or take some
16 proceedings within a prescribed period after the service of a notice or other paper upon the
17 party and the notice of paper is served by a method authorized by Rule 5(c)(2)(C), or (D),
18 ~~or (E)~~, five calendar days are ~~shall be~~ added after ~~to~~ the prescribed period would
19 otherwise expire under Rule 6(a).

20

21 State Bar Committee Note

22 2010 Amendment

23 Rule 6(e) is amended to remove any doubt as to the method for extending the time
24 to respond after service by mail or other means, including electronic means, if consented
25 to in writing by the recipient or ordered by the court. Five days are added after the
26 prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays,

1 and legal holidays are included in counting these added five days. If the fifth day is a
2 Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a
3 Saturday, Sunday, or legal holiday. The effect of invoking the day when the prescribed
4 period would otherwise expire under Rule 6(a) can be illustrated by assuming that the
5 thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the period expires on
6 the next day that is not a Sunday or legal holiday. If the following Monday is a legal
7 holiday, under Rule 6(a) the period expires on Tuesday. Five calendar days are then
8 added- Wednesday, Thursday, Friday, Saturday and Sunday. As the fifth and final day
9 falls on a Sunday, by operation of Rule 6(a), the fifth and final day to act is the following
10 Monday. If Monday is a legal holiday, the next day that is not a legal holiday is the fifth
11 and final day to act. If the period prescribed expires on a Wednesday, the five added
12 calendar days are Thursday, Friday, Saturday, Sunday, and Monday, which is the fifth and
13 final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that
14 is not a legal holiday is the fifth and final day to act.

15
16 Application of Rule 6(e) to a period that is less than eleven days can be illustrated
17 by a paper that is served by mailing on a Wednesday. If ten days are allowed to respond,
18 intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the
19 period expires under Rule 6(a). If there is no legal holiday, the period expires on the
20 Wednesday two weeks after the paper was mailed. The five added Rule 6(e) days are
21 Thursday, Friday, Saturday, Sunday, and Monday, which is the fifth and final day to act
22 unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal
23 holiday is the final day to act.